



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 6, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-0625

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113671.

The Texas Department of Health (the "department") received a request for information concerning certain complaints filed against Columbia Hospital at Medical City Dallas. You assert that portions of the requested information are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code. Government Code section 552.101 excepts from disclosure information that is made confidential by law, including information made confidential by statute. You have submitted the requested information to this office for review.

The department states, and we agree, that it has not sought an open records decision from this office within the statutory ten-day deadline. See Gov't Code § 552.301. The department's delay in this matter results in the presumption that the requested information is public. See *id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The applicability of section 552.101 provides such a compelling reason.

We observe that portions of the requested information consist of reports about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical

practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. Accordingly, the department must release these reports, but with deletions of information that identifies the persons specified in the regulation.

As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release deidentified HCFA 2567 documents. *See* Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with other state statutes. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the deidentification required by federal law is sufficient to protect the privacy interests of the patients.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Subchapter G of Chapter 241 of the Health and Safety Code provides for the disclosure of health care information in the possession of hospitals. Section 241.152(a) of the Health and Safety Code provides that "a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient without the written authorization of the patient or the patient's legally authorized representative." "Health care information" means "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(1). Section 241.153(3) provides several instances in which a patient's health care information may be disclosed without the patient's written authorization. One such instance is if the disclosure is to "a federal, state, or local government agency or authority to the extent authorized or required by law." *Id.* § 241.153.(3). There is no provision which addresses the re-release of the health care information by the department. Therefore, we do not believe that section 241.152 is applicable in this instance. You may not withhold any information under section 241.152 of the Health and Safety Code.

Section 611.002 of the Health and Safety Code, which pertains specifically to mental health patients, applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health and Safety Code § 611.001 (defining "patient" and "professional"). We have marked the information that may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health and Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

The Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08(b) provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b, §§ 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We note that some of the information at issue appears to have been obtained from hospital records. Hospital treatment is routinely conducted under the supervision of physicians. Thus, information relating to the diagnosis and treatment of a patient in a hospital is confidential under section 5.08 of the MPA. Open Records Decision No. 546 (1990). We agree that portions of the requested information consist of information obtained from confidential medical records. Thus, the department must release this information in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); see V.T.C.S. art. 4495b, §§ 5.08 (c), (j), (k). We have marked the documents accordingly.

Section 161.032 of the Health and Safety Code makes confidential the "records and proceedings of a medical committee." Under section 161.031(a) of the Health and Safety Code, a "medical committee" includes any committee of a hospital, medical organization, or extended care facility. It includes an ad hoc committee appointed to conduct a specific investigation as well as a committee established under the bylaws or rules of the organization. Health & Safety Code § 161.031(b). While the records and proceedings of a medical committee are confidential, *id.* § 161.032(a), the confidentiality does not extend to "records made or maintained in the regular course of business by a hospital." *Id.* § 161.032(c); Open Records Decision No. 591 (1991). Documents generated by a committee in order to conduct open and thorough review, as well as documents prepared by or at the direction of the committee for committee purposes, are confidential.

We believe some of the information is a record or proceeding of a medical committee made confidential by section 161.032 of the Health and Safety Code. See *Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977). Consequently, we have marked the information the department must withhold from the requestor.

You raise section 48.101 of the Human Resources Code, which pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

- (a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:
  - (1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];
  - (2) the identity of the person making the report; and
  - (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.
- (b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

We believe that some of the submitted information is confidential pursuant to section 48.101(a) of the Human Resources Code. *See Hum. Res. Code § 48.082(a); see also id. § 48.002 (definitions)*. Consequently, the reports must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id. § 48.101(b); but see id. § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances)*.

Some of the requested information is made confidential by section 261.201(a) of the Family Code which provides as follows:

- (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
  - (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
  - (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

See also 25 T.A.C. § 1.207 (confidentiality of Family Code § 261.201 investigative process and report). Some of the submitted records appear to constitute "files, reports, records, communications, and working papers used or developed in an investigation" under chapter 261 of the Family Code and are thus confidential. See Open Records Decision No. 440 (1986) at 2 (predecessor statute). Accordingly, we have marked the documents made confidential by section 261.201 of the Family Code that the department must withhold from disclosure under section 552.101 of the Government Code.

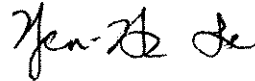
Section 552.101 of the Government Code also applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. See Open Records Decision No. 478 (1987). Individual determinations are required. See Open Records Decision No. 370 (1983). We have marked the information that is protected from disclosure under the common-law right to privacy.

Finally, the Texas courts have recognized the informer's privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5. In some instances, the informer's privilege is inapplicable because the subject of the information, i.e. the hospital, already knows the identity of the informer. We have marked the information that you may withhold under the informer's privilege.

In summary, we have marked the information that you must withhold; you must release the remainder of the information as it is not excepted by the exceptions you have raised.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 113671

Enclosures: Marked documents

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(w/o enclosures)